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United States Circuit Court, District of Oregon.

MARCUS NEFF *v.* SYLVESTER PENNOYER.

A state has the power to subject the property of non-residents, within its territorial limits, to the satisfaction of the claims of her citizens by any mode of procedure which it may deem proper and convenient, and therefore may, for such purpose, authorize a judgment to be given against such non-resident prior to seizure of such property and with or without notice of the proceeding.

But where a title depending on such *ex parte* action comes before a court of another jurisdiction, the proceedings will be closely examined to see that all the statutory requirements for their validity have been complied with.

The common-law presumption in favor of the jurisdiction and regularity of the proceedings of courts of record of general jurisdiction, had its origin in the fact that at common law no judgment could be given against a defendant until he had appeared in the action ; but no such presumption does or ought to apply in cases where the defendant is a non-resident, and there was no appearance, and only constructive service of the summons by publication.

THIS was an action to recover the possession of a half section of land situate in Multnomah county, the same being donation claim 57.

It was alleged in the complaint that the plaintiff was a citizen of California, and the owner, and entitled to the possession of the premises; and that the defendant was a citizen of Oregon and wrongfully withheld the possession of the premises from the plaintiff.

The answer of the defendant tacitly admitted the citizenship of the parties and the value of the premises, as alleged in the complaint, but denied the ownership of the plaintiff and his right to the possession of the premises, and set up a title thereto in himself. The defence of title in the defendant was controverted by the reply.

By consent of parties the cause was tried by the court without the intervention of a jury, and afterwards submitted on briefs.

John W. Whalley, M. W. Fechheimer and *W. W. Page*, for plaintiff.

H. Y. Thompson and *George H. Durham*, for defendant.

DEADY, J.—On the trial the plaintiff proved that a patent to the premises was issued to him by the United States on March 19th 1866, as a settler under the Donation Act of September 27th 1850, and rested his case.

Thereupon the defendant offered in evidence duly certified copies

of the complaint, summons, order for publication of summons, affidavit of service by publication and judgment in the action of *J. H. Mitchell* v. *Marcus Neff*, in the Circuit Court of the county of Multnomah, wherein judgment was given against the defendant therein on February 19th 1866, for the sum of $294.98; to the introduction of which papers the plaintiff objected, because: (1) said judgment is *in personam* and appears to have been given without the appearance of the defendant in the action or personal service of the summons upon him and while he was a non-resident of the state, and is therefore void; (2) said judgment is not *in rem*, and therefore constitutes no basis of title in the defendant; (3) said copies of complaint, &c., do not show jurisdiction to give the judgment alleged, either *in rem* or *personam;* and (4) it appears from said papers that no proof of service by publication was ever made, the affidavit thereof being made by the "editor" of the Pacific Christian Advocate and not by "the printer or his foreman or his principal clerk." The court admitted the evidence, subject to the objections.

The defendant then offered in evidence a certified copy of an execution issued upon said judgment on July 9th 1866, and the return thereon, from which it appears that the premises in question were sold upon said execution to satisfy said judgment on August 7th 1866, to J. H. Mitchell, for the sum of $341.60, to the introduction of which papers the plaintiff objected, because the judgment in *Mitchell* v. *Neff* being given without jurisdiction, the execution was void, and further, that the notice of sale upon said execution and attached to the return was no part of either, and therefore should not be admitted. The court admitted the evidence, subject to the objections.

The defendant then offered in evidence three papers, purporting to be deeds to the premises to the defendant, the first being signed by Jacob Stitzel, sheriff of Multnomah county, by his deputy, C. B. Upton, on January 14th 1867; the second, by said Stitzel, ex-sheriff of said county, on July 24th 1874; and the third, by E. J. Jeffery, sheriff of said county, on July 21st 1874; to the introduction of which papers the plaintiff objected, because as to the first one: 1. It was not made to the *purchaser* at the sheriff's sale. 2. It is not sealed, witnessed or properly acknowledged as a deed. As to the second one: 1. There being no valid judgment proved, the instrument is not a link in the chain of title.

2. It was not made to the *purchaser* at the sheriff's sale; and as to the third one, for the same reasons as in case of the second one, with the additional one: That it was not executed by the officer making the sale. The court admitted the evidence, subject to the objections.

The defendant then offered in evidence an assignment by J. H. Mitchell to the defendant of the certificate of purchase of the premises, dated August 10th 1866, to the introduction of which the plaintiff objected, because: 1. There being no valid judgment, assignment is not evidence of title in the defendant. 2. If there were a valid judgment to support the sale to Mitchell, the assignment would pass a mere equity to the defendant, to enforce a conveyance from the former after he had received one from the sheriff, and therefore it is not evidence of title in the defendant. The court admitted the evidence, subject to the objections.

The defendant having rested, the plaintiff offered in evidence a duly certified copy of the judgment-roll in *Mitchell* v. *Neff*, which contained not only the complaint, summons and other parts of the record of that case already introduced by the defendant, but also a copy of the affidavit of the plaintiff therein, upon which the order for publication was made; to the introduction of which the defendant objected, because said affidavit was not properly a part of the judgment-roll. The court admitted the evidence, subject to the objections.

Upon this evidence, the right of the plaintiff to recover is admitted, unless by virtue of the sale of the premises upon the judgment in *Mitchell* v. *Neff*, and the subsequent assignments of the certificate of purchase and the conveyances to the defendant, the legal title passed from the plaintiff to him.

Admitting that the proceedings in *Mitchell* v. *Neff* were duly taken according to the statute of the state in the case of non-resident debtors, what was the effect or force of the judgment as against the person of the defendant or his property? It is admitted on all hands that such a judgment is not binding *in personam*: Story's Con. of Laws, § 539; *D'Arcy* v. *Ketchum*, 11 How. 174; *Galpin* v. *Page*, 18 Wall. 367. And this rule is expressly declared in the Or. Code of C. P., § 506, as follows: "No natural person is subject to the jurisdiction of a court of this state, unless he appear in the court, or be found within the state, or be a resident thereof, or have property therein; and in the last case

only to the extent of such property at the time the jurisdiction attached."

Neither is it claimed by the defendant that this judgment had any other or greater effect than to enable the plaintiff therein to subject this property to the payment of the debt owed him by Neff.

But the plaintiff maintains that the court, in *Mitchell* v. *Neff*, could not acquire jurisdiction to reach the property of a non-resident or subject it to the payment of his debts, owed in this state, except by the actual seizure of such property contemporaneous with the commencement of the proceeding or before the rendition of the judgment therein.

In support of this position, the case of *Galpin* v. *Page*, decided by Mr. Justice FIELD, in the Circuit Court for the District of California, on August 31st 1874, is cited. In this case the learned judge, after showing that "the tribunals of one state have no jurisdiction, and can have none, over persons and property without its territorial limits," proceeds as follows: "But over property and persons within those limits the authority of the state is supreme, except as restrained by the Federal Constitution. When, therefore, property thus situated is held by parties resident without the state, or absent from it, and thus beyond the reach of the process of its courts, the admitted jurisdiction of the state over the property would be defeated if a substituted service upon the parties were not permitted. Accordingly, under special circumstances, upon the presentation of particular proofs, substituted service, in lieu of personal service, is allowed by statute in nearly all the states, so as to subject the property of a non-resident or absent party to such disposition by their tribunals as may be necessary to protect the rights of their own citizens. * * * A pure personal judgment, not used as a means of reaching property at the time in the state, or affecting some interest therein, or determining the status of the plaintiff, rendered against a non-resident of the state, not having been personally served within its limits, and not appearing to the action, would not be a judicial determination of the rights of the parties, but an arbitrary declaration by the tribunals of the state as to the liability of a party over whose person and property they have no control. The validity of the statute can only be sustained by restricting its application to cases where, in connection with the process against the person, property in the state

is brought under the control of the court and subjected to its judgment, or where the judgment is sought simply as a means of reaching such property or affecting some interest therein, or to cases where the action relates to the personal status of the plaintiff in the state."

But I see nothing in this language or the rule as there laid down, which supports or gives countenance to the position of the plaintiff, unless it be in the statement that the statute giving the right to proceed by publication against non-residents of the state is valid only when restricted "to cases where, in connection with the process against the person, property in the state is brought under the control of the court and subjected to its judgment."

Now, the property was "brought under the control of the court and subjected to its judgment" in *Mitchell* v. *Neff*, if at all, by the execution which issued upon the judgment. This process against the property of Neff was issued to enforce the judgment given in pursuance of the process against his person. The one was the inception and the other the completion of the proceeding, and so they were connected together as the links in a chain. Certainly, the process against the property could issue in connection with the process against the person without being exactly simultaneous with it. They were related parts of the same proceeding.

Besides, this judgment, though personal in form, was procured, intended and used simply as a means of reaching the property of Neff then within the state, and according to the rule in *Galpin* v. *Page*, *supra*, is so far valid and binding.

But the power of the state over the property within its limits, of non-residents, being supreme, and it being admitted on all hands that the state may subject such property "to such disposition by their tribunals as may be necessary to protect the rights of its own citizens," in my judgment, the mode of exercising this power is a matter for the state to determine. In the exercise of this power it may require that the proceeding be strictly *in rem* and commenced by the seizure of the property, or it may, as provided in this state, upon the proper preliminary showing, permit a suit to be maintained against the non-resident by name—nominally—for the purpose of enabling the plaintiff therein to first judicially establish his right or claim against such non-resident, and then authorize the seizure and disposition of the property so as to satisfy the

same. In either case the result is the same; while the latter mode of proceeding has this to commend it over the former, that it does not permit the seizure or interference with the property of the non-resident until the right or claim of the citizen in or to it is satisfactorily established.

Nor does it appear to me that the state is bound in any case to provide for giving notice to the absent party by publication of the summons or otherwise. That matter pertains to the mode of proceeding over which the state has absolute control. The notice usually given is merely constructive, and in a large number, if not in a majority, of cases, gives no information to the absent party. Of course it is the duty of the state to deal justly and considerately with non-residents who have property within her jurisdiction, and therefore it should provide as far as practicable that no proceeding should be taken in her courts to affect such property, without notice to the owner.

It being shown that the state has the power to subject the property of non-residents to the payment of debts owing to her citizens by such a proceeding as may by law be provided, including one in which such property is not seized prior to judgment, but thereafter, and then only for the purpose of satisfying said judgment, it remains to be considered whether the judgment in *Mitchell* v. *Neff* was given by a court having jurisdiction to do so according to the laws of the state. * * *

[The learned judge then proceeds to consider, in detail, the objections to the proceedings, and decides that, as the affidavit on which the order of publication was based did not comply with the requirements of the statute, the court had never obtained jurisdiction, and the proceedings were void. This part of the opinion is omitted as purely local.]

Judgment for plaintiff.